

Hearing: September 19, 2012, 10:00 a.m. (ET)

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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)	
In re:)	Case No. 12-12020 (MG)
)	
RESIDENTIAL CAPITAL, LLC, et al.,)	Chapter 11
)	
Debtors.)	Jointly Administered
)	
)	
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**FINANCIAL GUARANTY INSURANCE COMPANY'S
STATUS CONFERENCE REPORT**

Financial Guaranty Insurance Company ("FGIC") submits this Report to inform the Court about the status of the discovery process regarding the proposed RMBS settlement and respectfully states as follows:

Preliminary Statement

1. FGIC¹ understands that the Debtors seek to retain both the November 5 Hearing date and the intermediate deadlines. However, the significant delay caused by the Debtors' failure to timely produce requested documentation, as well as the unwieldy and cumbersome nature of the data room used by the Debtors, make it impossible to properly evaluate the

¹ FGIC is the plaintiff in twelve lawsuits filed against several of the above-captioned debtors (collectively, the "Debtors") and their non-debtor affiliates, and is a creditor of the Debtors with claims in excess of \$1 billion. Although FGIC is also co-chair of the Official Committee of Unsecured Creditors ("OCC"), it has retained its own expert advisors and engaged in separate discovery to evaluate the settlement. In filing this response, FGIC seeks to provide its own perspective to the Court and does not speak for the OCC.

proposed settlement in the time remaining. The Debtors did not provide a detailed index to their data room and its design makes it impossible to search for specific documents between specific parties or about specific topics. And only on Friday, September 14, did the Debtors start loading “thousands” of emails and other documents into the data room, the completion date for which remains unknown.

2. Against this backdrop, fact discovery against the Debtors is set to close on September 24, 2012. This deadline would provide FGIC a mere five days to review the Debtors’ new (and continuing) voluminous discovery responses and prepare for and conduct multiple depositions—even assuming the Debtors had completed, not just begun, their production.

3. The Court was told that the Debtors “will move Mother Earth” to keep the November 5 hearing date. (Hr’g Tr. at 31:18-19, Sept. 11, 2012 (Exhibit “A” attached hereto)). But, the Scheduling Order was based on the assumption that the Debtors would expeditiously provide the data necessary to conduct a meaningful analysis. (*See id.* at 17:6-9, 18-21). While there was a seismic shift after the September 11 Status Conference, it remains insufficient.

4. FGIC is entitled to the documents it has sought and to adequate time to review and analyze the information provided and that is still promised. As the Court has expressed, interested parties must be allowed “a full and fair opportunity to prepare and be able to put on whatever case they wish to put on” with respect to the 9019 Motion. (*Id.* at 41:1-4).

The Debtors Have Been Dilatory in Responding to FGIC’s July 2012 Discovery Requests

5. FGIC served its Document Requests and Interrogatories on the Debtors two months ago, on July 13 and July 18, 2012, respectively.² Initially, the Debtors only agreed to

² FGIC has served discovery on the Debtors, and its parent AFI, as well as on the Steering Committee of RMBS claimants represented by Gibbs & Bruns, and the Talcott Franklin group of investors. That discovery has not yet been completely responded to by AFI and Gibbs & Bruns.

provide access to a virtual “data room” containing documents that the Debtors represented would both respond to FGIC’s discovery requests and enable FGIC to evaluate the proposed settlement.

6. Although the data room is organized into a variety of folders, it is not readily searchable, and until recently neither were most of the individual documents. There is no identifying index of all documents set out with normal headings such as To, From, Date, Category (*i.e.*, email, correspondence, agreement, court pleading). Further, there is no identifying information (*i.e.*, a unique description or even a date) on the individual documents.

7. The document names contain no identifying description—not even who authored the document or when it was authored—such that, even though a search is possible, any search is effectively useless. Initially, the data room contained 1,700 PDF files labeled only with a generic sequential number, such as RC 9019_00029765. Exhibit “B” attached hereto is a screenshot of the database, showing the contents of one folder. Because of this design, every individual document has to be separately opened and examined to identify it, and the reviewing party must create its own index to search for and find relevant documents.³

8. FGIC wrote to the Debtors on August 30, 2012 to explain the deficiencies in the Debtors’ discovery responses, including the problems with the data room. (*See* Exhibit “C” attached hereto). One key issue was that no emails, memoranda or other correspondence concerning the settlement and the settlement process had been produced.

9. The Debtors delayed responding until September 6 (*see* Exhibit “D” attached hereto), and were unable to participate in a meet and confer until Wednesday, September 12,

2012. Following the Court’s comments at the September 11 conference that the Debtors’ have

³ By way of example only, Kathy Patrick of Gibbs & Bruns LLP represented the largest group of RMBS holders and was apparently a key participant in negotiating this settlement with the Debtors and AFI. As such, documents sent to or from Ms. Patrick and her firm are obviously relevant to the issues, and essential to review prior to depositions of the relevant parties. However, a search of “Patrick” or “Kathy Patrick” in the database turns up no results. The only way for FGIC or any other party to locate such a document (FGIC has located only two so far) is by opening and reviewing literally every single document.

“not complied with the schedule” regarding discovery (Hr’g Tr. at 18:14-18), and that the November 5th hearing date was in jeopardy, (*see id.*; *id* at 47:20-23), the Debtors did begin on September 14, 2012 providing substantial documents relating to settlement negotiations. However, it is currently unknown when the Debtors will complete their production. This is to say nothing of the substantial time required to access, load, review, and analyze those documents, and prepare for depositions.

10. On Monday, September 17, 2012, the Debtors provided a purported partial cure to the unworkable nature of the data room by replacing many of the documents with individually searchable versions, albeit if separately located, opened, and viewed. The Debtors still have not provided an index, the documents are still not labeled or named, so it is still impossible to search across the entire production. The thousands of new documents that are just now being dumped into the data room, will still have to be individually opened and sorted in order to be identified and analyzed. FGIC has already expended considerable time and expense making the originally produced documents searchable and will incur further delay and expense to make available the reproduced documents on its review platform.

11. Finally, FGIC has not received a privilege log that would explain the number, scope and nature of the documents withheld and the theory for preventing disclosure. Issues relating to privilege determinations will undoubtedly require further time to resolve.

Ally Financial, Inc. Has Refused to Engage in Discovery With FGIC

12. Compounding the Debtors’ failure to timely and properly comply with their discovery obligations, FGIC continues to be stonewalled in its efforts to receive discovery from another key party to the settlement process; namely, the Debtors’ parent company, Ally Financial, Inc. (“AFI”). AFI remarkably claims that it is not a relevant party to the settlement for

discovery purposes, notwithstanding its central role in designing this bankruptcy case, the RMBS Settlement and the simultaneously negotiated Plan Support Agreements that provided for a Plan containing releases for AFI from the Debtors and all third parties, like FGIC, who have asserted claims against AFI. Indeed, it appears that these bankruptcy cases have been pursued, directed, and managed by AFI as a critical part of AFI's long term business and operational plans. As the Debtors' ultimate parent company, AFI is inextricably bound to the negotiation, consummation, effect and operation of the settlement arrangement.

13. This is reflected in the very press release AFI issued in connection with the Debtors bankruptcy filing, titled "Ally Financial Announces Key Strategic Actions to Strengthen Company and Accelerate Ability to Repay U.S. Treasury." The Press Release, attached hereto as Exhibit "E" goes on to state:

Ally Financial Inc. (Ally) today announced key strategic actions aimed at strengthening the company's longer term financial profile and accelerating repayment of the U.S. Treasury's investment. The actions include the decision by the mortgage subsidiary, Residential Capital, LLC and certain of its subsidiaries (ResCap), to file Chapter 11

...

The action by ResCap will enable Ally to achieve a permanent solution to its legacy mortgage risks and put these issues behind us, said Ally Chief Executive Officer Michael A. Carpenter.

...

A key feature of ResCap's prearranged Chapter 11 plan is proposed settlements among Ally, ResCap's Chapter 11 estates and certain of ResCap's creditors that provide for the release of, among other things, all existing and potential claims between Ally and ResCap, as well as a release of all existing or potential causes of action against Ally by third parties.

...

Absent the determination by the ResCap board of directors to file for Chapter 11, ResCap would have required billions of dollars of support from its parent to meet its obligations, which would have substantially delayed Ally's plans to repay the remaining capital investment to the U.S. Treasury.

14. FGIC has written AFI to challenge AFI's refusal to produce relevant documents and is currently awaiting AFI's response.

The Current Discovery Deadlines Should Be Extended and the November 5th Hearing Date Postponed Until Meaningful Discovery Is Complete

15. The extensive delay by the Debtors, coupled with AFI's total obstinacy, has made it impossible for FGIC, in the words of the Court, to "hav[e] a full and fair opportunity to prepare and be able to put on whatever case they wish to put on" with respect to the 9019 Motion. (Hr'g Tr. at 41:1-4). The Debtors have not fulfilled the heavy burden they undertook to meet the aggressive timetable they sought to impose.

16. In light of the foregoing, FGIC respectfully requests that the Court adjust the current Scheduling Order, providing additional time for discovery, and move the hearing as the Court deems appropriate.

Dated: September 18, 2012

/s/ Richard L. Wynne

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